Tien Ik Enterprises Sdn Bhd & Ors v Woodsville Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-317 OF 1994

JEMURI SERJAN CHIEF JUDGE (SABAH & SARAWAK), MOHAMED DZAIDDIN AND WAN ADNAN FCJJ

25 MARCH 1995

Companies and Corporations *— Winding up — Just and equitable rule — Whether quasi-partnership — Whether one or more of elements in Ebrahimi's case must exist — Whether court must consider alternative remedies — Companies Act 1965 s 218(1)(i)*

Companies and Corporations *— Winding up — Just and equitable rule — Opression — Exclusion from management — Family-owned company — Breakdown of mutual trust and confidence — Companies Act 1965 s 218(1)(i)*

The appellants appealed against the decision of the High Court in ordering that the first appellant and three other companies owned by the Kuok family be wound up under the 'just and equitable' provision of s 218(1)(i) of the Companies Act 1965 ('the Act'). [See [1994] 3 MLJ 89.] The appellants contended that: (i) before the court could import equitable considerations to govern the relationship between shareholders, at least one of the three elements identified by Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289 had to be present; and (ii) the court had first to consider the availability of alternative remedies because the phrase 'just and equitable' would import that requirement although there was no statutory requirement to do so as in the United Kingdom and Australia. They further argued that there had been inordinate delay in the presentation of the petition which would disentitle the respondent from obtaining the equitable relief.

Held, dismissing the appeal:

(1) It is not essential and therefore not a condition that before the *Ebrahimi* principles can be applied, the elements or at least one of the three elements mentioned by Lord Wilberforce must be present. To interpret it in the way contended by the appellants would be putting something in the judgment which is not there.

(2) There are no provisions in the Act which require the court to consider the availability of alternative remedies. Therefore, such provisions should not be written into the Act. It was not obligatory for the court to consider the availability of alternative remedies before making a winding-up order under s 218(1)(i) of the Act.

(3) It is clear that the parties had agreed in March 1987 to wind up the companies voluntarily and that was clear evidence that they no longer enjoyed the confidence of each other and the voluntary

winding up was their solution to their problems. While that was not a reason for winding up the companies, it provided convincing evidence of the breakdown of mutual confidence among the parties to justify the winding up on the just and equitable ground. A

(4) The judge had rightly exercised her discretion in excusing the delay in bringing the petition by taking into account, inter alia, the fact that the parties are related to one another by blood and their natural tendency to try and settle family matters amicably through discussions. B

[Bahasa Malaysia summary C

Perayu telah membuat rayuan terhadap keputusan Mahkamah Tinggi dalam memerintahkan supaya perayu pertama dan tiga buah syarikat lain yang dipunyai oleh keluarga Kuok digulung di bawah peruntukan 'adil dan saksama' di bawah s 218(1)(i) Akta Syarikat 1965 ('Akta itu'). [Lihat [1994] 3 MLJ 89.] Perayu menegaskan bahawa: (i) sebelum mahkamah boleh menggunakan pertimbangan saksama untuk menentukan perhubungan di antara pemegang-pemegang saham, sekurang-kurangnya satu daripada tiga unsur yang dikenal pasti oleh Lord Wilberforce dalam *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289 mesti wujud; dan (ii) mahkamah mesti terlebih dahulu mempertimbangkan adanya remedi alternatif kerana ungkapan 'adil dan saksama' mengenakan keperluan itu walaupun tidak ada keperluan statutori untuk berbuat demikian seperti yang terdapat di United Kingdom dan Australia. Mereka juga berhujah bahawa terdapat kelengahan yang melampau dalam pengemukaan petisyen itu yang akan menyebabkan responden tidak berhak mendapat relief saksama itu. D E F

Diputuskan, menolak rayuan itu:

(1) Ia adalah tidak penting dan oleh itu bukanlah satu syarat bahawa sebelum prinsip *Ebrahimi* boleh digunakan, unsurnya atau salah satu daripada unsur yang dinyatakan oleh Lord Wilberforce itu mesti wujud. Untuk mentafsirkannya dalam cara seperti yang ditegaskan oleh perayu akan memasukkan sesuatu yang tidak terdapat di dalam penghakiman itu. G

(2) Tidak terdapat apa-apa peruntukan di dalam Akta itu yang memerlukan mahkamah mempertimbangkan remedi alternatif. Oleh itu, peruntukan sedemikian tidak seharusnya dituliskan ke dalam Akta itu. Adalah tidak wajib bagi mahkamah mempertimbangkan adanya remedi alternatif sebelum membuat perintah penggulungan di bawah s 218(1)(i) Akta itu. H I

(3) Adalah jelas bahwa pihak-pihak tersebut telah bersetuju sejak Mac 1987 untuk menggulung syarikat-syarikat itu secara sukarela dan ini merupakan bukti yang jelas bahawa mereka tidak lagi menikmati keyakinan satu sama lain dan bahawa penggulungan

sukarela itu adalah penyelesaian masalah mereka. Meskipun itu tidak merupakan suatu sebab untuk penggulungan syarikat-syarikat tersebut, ia sudah tentu memberikan bukti yang menyakinkan tentang terputusnya perasaan saling yakin di kalangan pihak-pihak itu untuk menjustifikasi penggulungan syarikat-syarikat tersebut atas alasan adil dan saksama.

(4) Hakim telah menggunakan budi bicara beliau dengan betul dalam mengecualikan kelengahan dalam mengemukakan petisyen itu dengan mengambil kira, antara lain, hakikat bahawa semua pihak adalah saudara sedarah dan kecenderungan biasa mereka untuk mencuba menyelesaikan perkara keluarga secara persahabatan melalui perbincangan.]

Notes

For cases on winding-up on just and equitable grounds, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 473–482.

Cases referred to

Carpenter v Carpenter Grazing Co Pty Ltd & Ors (1985) 4 ACLC 18 (refd)

Ebrahimi v Westbourne Galleries Ltd & Ors [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289 (folld)

Eiserman v Ara Farms Ltd 52 DLR 498 (refd)

Mincom Pty Ltd v Murphy [1983] 1 ACLC 749; [1983] 1 Qd R 297 (not folld)

Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692 (refd)

Ng Eng Hiam v Ng Kee Wei & Ors [1965] 1 MLJ 238 (refd)

Tan Choon Keng Realty (Pte) Ltd & Ors v Tan Wee Cheng [1992] 2 SLR 1114 (folld)

Legislation referred to

Companies Act 1965 ss 181, 218(1)(i)

Companies Act 1981 s 367(3) [Aust]

Companies Act 1948 s 222(f), 225(2)(b) [GB]

Companies Act (Cap 50) [Sing]

Appeal from: Companies Winding Up Petition No D2–28–187–90 consolidated with petitions No D2–28–192–90, D2–28–197–90 and D2–28–202–90 (High Court, Kuala Lumpur)

CV Das (*M Nagarajah* and *MK Mohan* with him) (*Shook Lin & Bok*) for the appellant.

Cecil Abraham (*YC Yong* and *RS Nathan* with him) (*Peter Yip & Yong*) for the respondent.

Wan Adnan FCJ (delivering the grounds of judgment of the court): This is an appeal against the decision of the learned judge of the High Court at Kuala Lumpur in ordering that the companies, namely:

(1) Tien Ik Enterprises Sdn Bhd;
(2) Tien Ik Credit Sdn Bhd;
(3) Giltspur Holdings Sdn Bhd; and
(4) Tien Ik Sdn Bhd,

be wound up under s 218(1)(i) of the Companies Act 1965.

The four separate petitions were consolidated by consent of both parties. They agreed as a matter of convenience to proceed with the first petition in D2–28–187–90 and agreed that orders made in the first petition would bind the other petitions as well. The learned judge said so in her written judgment and these are borne out by the notes of evidence recorded by the learned judge. As it happened, the learned judge, after hearing the first petition and making the orders therein, made similar orders for the other petitions.

We do not think the judge was wrong in this respect. The parties themselves had agreed to the procedure adopted. They cannot now complain. The parties in the four petitions are the same. The facts relied on are the same.

The facts of the case are clearly set out in the learned judge's judgment. For ease of reference, they are produced hereunder ([1994] 3 MLJ 89 at pp 94–97):

> The petitioner is a nominee company of Peter Kuok Khoon Hwong (Peter), the eldest of seven siblings of Kuok Hock Chin ('Kuok Sr'). The seven siblings are:
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> (1) Peter Kuok;
> (2) Joshua Kuok;
> (3) Helen Kuok;
> (4) James Kuok;
> (5) Andrew Kuok;
> (6) Irene Kuok; and
> (7) David Kuok.
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> Thus the second, third and fourth respondents are Peter's brothers and sister whilst the fifth respondent is Peter's nephew, he being the son of Joshua, the second of the seven siblings. James is not cited a party as he had already filed separate proceedings against the first and second respondents in Singapore and Malaysia and he has settled his claims against them. The other sibling, Andrew, has also brought separate proceedings against the first and second respondents for an account of his share in the first respondent and the matter is still pending.
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> The first respondent was incorporated on 7 March 1978, with an authorized capital of RM2m, divided into two million shares at RM1 each. To date, it has a paid-up capital of RM1m, divided into one million shares of RM1 each. It was incorporated to carry on business as general traders including the buying and selling of all forms of investments. The petitioner who is Peter's investment arm, is a shareholder, so too Parquin Sdn Bhd, K-Crest Sdn Bhd, Milverton Sdn Bhd (the nominee companies of the

second, third and fourth respondents, respectively), the fifth respondent and Andrew in equal shares. Up to 1989, Peter was a director but presently the Board is made up of the second to fifth respondents.

The first respondent is one of an array of companies set up in 1978 in Malaysia, Singapore and Hong Kong as the vehicles to further the family fortune. The other companies are:

Malaysia	Year incorporated
(1) Tien Ik Sdn Bhd (TISB)	1973
(2) The first respondent	1978
(3) Tien Ik Credit Sdn Bhd (TICSB)	1978
(4) Giltspur Holdings Sdn Bhd	1978

These four Malaysian companies form the subject matter of the four consolidated petitions.

Singapore	
(5) Tien Ik Holdings Pte Ltd	1973
Hong Kong	
(6) K-Rex Holdings Ltd	1978
(7) K-Rex Insurance Ltd	1978
(8) K-Rex Enterprises Ltd	1978
(9) Giltspur Enterprises Ltd	1978
(10) Omsby Trading Ltd	1978
(11) Worldport Trading Ltd	1984
(12) Giltspur Nominees Ltd	1978

I shall refer to all these companies as the family companies.

There was also in existence two family trust funds. The first of these, known as the KHC Trust Fund, was set up in 1974 and the primary beneficiaries were Kuok Sr, his wife, children and grandchildren. Under the terms of the trust deed, Unipar Sdn Bhd was appointed the sole trustee with powers to determine the vesting day and the ultimate beneficiaries. This trust became vested on 30 June 1983, and Peter's 1/6th share as well as the shares of the other siblings were ploughed into the pool fund in 1984, the details of which are discussed further in this judgment.

The other family trust fund was the Peduka Trust set up in Hong Kong in 1978 to regulate all the proceeds of sale of all the overseas assets belonging to the family of Kuok Sr. This trust became vested in 1984 and Peter became entitled to a 1/6th share.

Besides the two trust funds, there were two other family companies set up by Kuok Sr and members of his immediate family, these being:

(1) Kuok (Singapore) Pte Ltd, a company incorporated in Singapore ('the Singapore company'); and

(2) Kuok Brothers Sdn Bhd, a company incorporated in Malaysia ('the Malaysian company').

All the seven siblings hold a substantial amount of the shares in both the Singapore and Malaysian companies.

In 1977, following differences between Kuok Sr and his brother, Kuok Sr and members of his family withdrew from the Singapore and Malaysian companies and sold their holdings in both the companies. For this purpose, Peter appointed two of the family companies, TISB and Tien Ik Holdings Pte Ltd, as his agents to sell his shares.

Kuok Sr then got his children to pool the proceeds of sale of all their holdings in the Singapore and Malaysian companies into a common pool fund for the purpose of reinvesting their moneys jointly. This pool fund was set up in January 1978 and over the years, this pool fund swelled, as whatever moneys were due to the siblings were paid into the pool fund for further reinvestment. Kuok Sr relied and depended on the second respondent, his youngest son and a chartered accountant, to manage the pool fund and this triggered the start of the many differences amongst the siblings.

To begin with, James fell out with Kuok Sr and the second respondent in August 1978 when he questioned the second respondent about the investments he was making from the pool fund. Dissatisfied with the way the second respondent was managing the pool fund, he opted to withdraw on condition the second respondent supplied him with an account of all the investments the second respondent had made up to 16 September 1978.

The second respondent produced such an account and handed it together with a declaration deed for James to sign. In essence, the deed required him to relinquish all his claims against other members of the family and the family companies in return for approximately RM5m due to him from the pool fund.

At about the same time too, the second respondent produced a progress report dated 7 August 1978, setting out the investments he had made with the pool fund through the family companies and circulated it to his brothers and sisters.

James refused to accept the accounts prepared by the second respondent nor sign the declaration deed and the upshot of this was that he instituted legal proceedings in Singapore and Malaysia to enforce his entitlement of his share in the pool fund notwithstanding the deployment of the pool fund into the family companies. Both suits have been settled in 1984 and James was paid approximately RM3.8m.

Kuok Sr died on 3 November 1979, and this further widened the differences of the siblings particularly over the second respondent's management of the pool fund.

Andrew and the second respondent fell out over certain investments in Hong Kong resulting in Andrew leaving the Hong Kong companies which he had been managing until then. On 25 September 1980, he indicated his desire to withdraw from the pool fund, effective from 31 August 1980, and he requested the second respondent for an account to be taken of his entitlement.

When the second respondent failed to do so, Andrew sought the good offices of the family solicitor in Singapore in May 1981 to intercede on his behalf. Despite attempts made by the family solicitor and other members of his family, the second respondent did not produce any accounts. Finally, on 13 February 1986, Andrew sued Peter, the second to fourth respondents, his mother as the administratrix of the estate of Kuok Sr and Unipar Sdn Bhd, trustee of the KHC Trust Fund, in Kuala Lumpur Civil Suit No 22–28–86 seeking a declaration that the pool fund ended on 31 August 1980,

A and the second respondent account for his share of the pool fund. This suit is still pending.

The second respondent has not denied that the first respondent and the other family companies are vehicles for investing the pool fund and that he actively managed the pool fund during his father's lifetime and after his father's death, until 3 December 1986, when he indicated his intention to B relinquish all his executive functions in the first respondent and the other family companies, citing ill-health and the breakdown of his marriage as the reasons for his withdrawal.

From 1987 until 1989, Peter took over the reins of managing the first respondent and the other family companies and it was in 1987 that the C siblings agreed that the pool fund be distributed and that they be paid the capital of all investments made with the pool fund in the family companies of which they are shareholders. As this entails the winding up of some of the family companies concerned and a drawing up of accounts of the pool fund and the family companies, Peter engaged the services of two accountants to look into the accounts of the operations of the family companies in Malaysia D and Hong Kong. From their investigations, Peter discovered that the second respondent had channelled large sums of the pool fund to a number of overseas corporations, principally Bimelec Investment Corp incorporated in Panama on 18 October 1977, as the holding company for the family companies incorporated in Hong Kong.

Peter then appointed a firm of accountants, Deliotte, Haskins & Sells E in Hong Kong ('DHS') to audit Bimelec's accounts and the family's Hong Kong companies into which Bimelec had invested the pool fund. DHS was only able to produce a draft account, PK20, and when it was submitted to the second respondent for his review and comments, he only offered general comments which were insufficient to unravel the investments he had made during the past ten years.

F Peter also discovered that two of the family companies based in Hong Kong, namely K-Rex Enterprise Ltd and Worldport Trading Ltd, had extended large credit facilities to a group of companies belonging to one William Wong without sufficient securities. Peter then took upon himself to inquire into these lendings as the accounts were all overdue and the result was that on 25 February 1989, he was removed as a director of the two G companies.

Peter also discovered that the second respondent had used the pool fund to extend a RM1.4m loan to Bournemouth Sdn Bhd. A civil suit was filed in Kuala Lumpur in 1983 to enforce repayment but to date, Bournemouth has not paid up.

H Following Peter's persistent probings, the second to fifth respondents, as the majority shareholders and directors of the first respondent, passed a number of resolutions, all aimed at excluding Peter from the management of the first respondent as well as managing the other family companies by removing him as the chairman and executive director of the first respondent as well as the director of the other family companies.

I The contentions of the petitioner are:

(1) that the first respondent is a domestic company formed on the basis of the personal relationship involving personal trust and mutual

confidence amongst brothers and sisters. The association is in the nature of a quasi-partnership; and

(2) that the underlying trust and mutual confidence have deteriorated over the years and now cease to exist due primarily to the conduct of the second respondent.

Section 218(1)(i) of the Companies Act 1965 reads as follows:

> The Court may order the winding up if —
>
> ...
>
> (i) the Court is of the opinion that it is just and equitable that the company be wound up ...

Our s 218(1)(i) is in pari materia with the provisions of s 222(f) of the English Companies Act 1948. The application of the 'just and equitable' provision in the section was discussed in the House of Lords case of *Ebrahimi v Westbourne Galleries Ltd & Ors* [1973] AC 360; [1972] 2 All ER 492; [1972] 2 WLR 1289. In that case, Lord Wilberforce said ([1973] AC 360 at p 379; [1972] 2 All ER 492 at pp 499–500; [1972] 2 WLR 1289 at pp 1297–1298):

> My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence — this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders

A shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company — so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words B themselves.

It was the contention of the learned counsel for the appellants before the learned judge that the elements mentioned in the judgment of Lord Wilberforce must be present before a company can be regarded as one which can be imbued with the characteristics of a quasi-partnership C association. The learned judge did not accept it. She said ([1994) 3 MLJ at pp 100–101):

I cannot accept this contention as the judgment does not say that. It merely sets out the circumstances under which the equitable considerations can be adopted and by way of an illustration, the three elements were stated as D examples of circumstances where the just and equitable provision can apply. I emphasize that *Ebrahimi*'s case does not lay down any test when the 'just and equitable' provision can be applied.

Before us the same point was taken. The learned counsel contended that the learned judge had misunderstood and misapplied the principles in the case. He said the three elements identified by Lord Wilberforce were the E conditions on which the court would be prepared to import equitable considerations to govern the relationship between shareholders and not confine it to be governed solely by the articles of the company. He further submitted that to correctly apply the *Ebrahimi* rules, the learned judge was obliged to find if one or more of the three elements existed. Two Australian F cases were referred to us, namely, *Carpenter v Carpenter Grazing Co Pty Ltd & Ors* (1985) 4 ACLC 18, and *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692.

We have carefully studied the cases and with respect say that these two cases do not say that the elements mentioned by Lord Wilberforce G must first be present before the principles in *Ebrahimi*'s case can be applied, namely to import equitable principles to govern the relationship among the shareholders.

The learned counsel also referred us to one Canadian case of *Eiserman v Ara Farms Ltd* 52 DLR 498. With respect, we say also that this case does not say the elements must first be present before the *Ebrahimi* principles H can be applied.

We are of the view that the learned judge was correct in her interpretation of the judgment of Lord Wilberforce. It is not essential and therefore not a condition that before the *Ebrahimi* principles can be applied, the elements or at least one of the elements mentioned by Lord Wilberforce I must be present. To interpret in the way contended by the learned counsel would be putting something in the judgment which is not there.

It was also the contention of the learned counsel for the appellants that the companies ought not be wound up as there were other alternative

remedies available to the petitioner. It was argued that the objective of the petitioner in filing the petition was the onsetting age and the need to retrieve the petitioner's investment. The remedy could be obtained under s 181 of the Companies Act 1965 on a compulsory order for the shares to be bought out by the others at market value without the need to wind up the companies. He contended that though there is no statutory requirement to consider alternative remedies as in the United Kingdom and Australia, the phrase 'just and equitable' would import the requirement. In support, he referred us to a passage in Walter CM Woon's *Company Law* where the learned author at p 499 says:

> Winding up is a drastic remedy. When it is sought to invoke the court's discretion to wind the company up, the fact that the petitioner has an alternative remedy is relevant. Thus if the petitioner is able to sell his shares at a reasonable price it would be more difficult to justify a winding up since he would not need the aid of the court to extricate his investment. Similarly, if the petitioner's grievances can be redressed under s 216 (s 181 Malaysian Companies Act) a court should be reluctant to grant the rather draconian remedy of winding up.

Section 225(2)(b) of the English Companies Act 1948 provides as follows:

> Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if it is of opinion —
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> ...
>
> (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,
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> shall make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

Similar provisions are also contained in s 367(3) of the Australian Companies Act 1981.

Clearly under these provisions, the courts have to consider the availability of alternative remedies.

But we do not have such provisions in our Companies Act 1965. Neither do they appear in the Singapore Companies Act (Cap 50).

The same submission was made in Singapore in the case of *Tan Choon Keng Realty (Pte) Ltd & Ors v Tan Wee Cheng* [1992] 2 SLR 1114. The Australian case of *Mincom Pty Ltd v Murphy* [1983] 1 ACLC 749; [1983] 1 Qd R 297 was relied on as an authority. *Mincom*'s case was decided under Queensland's Companies Code. The aggrieved member also had the alternative remedy of selling his shares in accordance with the procedure set out in the articles. An injunction was granted to restrain him from filing the said petition on the ground that the available procedure for sale of his shares had not been followed.

The learned judge in the Singapore case had this to say ([1992] 2 SLR 1114 at p 1135):

A In my view, *Mincom*, properly understood, does not support the argument of counsel on this point. Section 367(4) of the Code expressly provided that the court should not make a winding-up order if there was an alternative remedy available. There is no such statutory power given to a Singapore court.

B The learned counsel for the appellants contended that the decision in the Singapore case is wrong. But how can it be wrong when the decision is based on the correct premise? How can cases from other jurisdictions be relevant when they are decided on provisions of law which are absent in the local legislation?

C The position is the same here. The United Kingdom and the Australian provisions are not in our Companies Act 1965. We should not write them into our Act.

We are of the view that the Singapore decision is correct. It is not obligatory for our courts to consider the availability of alternative remedies before making a winding-up order under s 218(1)(i) of the Companies Act D 1965.

It was also contended on behalf of the appellants that the learned judge was wrong in her finding of facts.

Let us see the learned judge's approach on the facts. She said ([1994] 3 MLJ 89 at pp 99–100):

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> From the averments of the affidavits filed by both the petitioner and the respondents, it becomes necessary to determine, firstly, the true nature of the first respondent, the purpose of its incorporation and its composition as these factors can indicate the underlying rights and obligations which the members have towards each other.

F Then after reviewing the evidence, she came to the conclusion [at pp 101–102]:

> From the very beginning to this day, the members of the first respondent, who provided the capital for the company from the pool fund, were confined to the children of Kuok Sr or their nominees and in that sense it is a G domestic company. Although they subscribe to the memorandum and articles of association, I consider that from the nature of the formation and set up of the first respondent, their obligations as members go beyond that laid down by the memorandum and articles of association. The first respondent is definitely a family association made up by the children and grandson of Kuok Sr and it is their personalities as such that single out the first respondent H to be a company where the members' relationship is akin to that of partners.

The learned judge made the findings after reviewing all the evidence before her.

Then she gave her reasons why she found it justified to wind up the first respondent. She said [at p 103]:

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> In the light of the scenario that I have painted, is there any justification for this court to wind up the first respondent under the just and equitable provision of s 218(1)(i) of the Act?

I answer this in the affirmative for the following reasons. A

(1) The mutual trust and underlying confidence, which formed the basis of the association, have ceased to exist altogether. This is evidenced by James and Andrew pulling out of the pool fund and the presence of the many legal actions which the other members of the family had filed against each other in 1989 over the same subject matter, ie the return of their capital in the pool fund through the investments made by the B second respondent in companies like the first respondent and the other family companies established for that very purpose.

(2) The present state of affairs of the first respondent could not possibly have been contemplated by Kuok Sr or the parties in this petition when they agreed to pool their resources and become members of the first C respondent.

(3) With the exception of the fifth respondent, age is running against Peter and the second to fourth respondents. Peter is now 63 and he should not be allowed to wait for his money forever. The first respondent is solvent. It has no creditors but it has never declared any dividends.

(4) All the shareholders, without exception, have declared their intention D to have the first respondent wound up from as long ago as March 1987, but no steps have been taken until now to fulfil that common intention.

From the fourth ground above, it is clear that the parties had agreed as far back as March 1987 to wind up the companies voluntarily and this is clear evidence that the parties in the case no longer enjoyed the confidence of E each other and that the voluntary winding up was their solution to their problems. While it is not a reason for winding up the companies, it certainly provides convincing evidence of the breakdown of mutual confidence among the parties to justify the winding up of the companies on the just and equitable ground.

In the Privy Council case of *Ng Eng Hiam v Ng Kee Wei & Ors* F [1965] 1 MLJ 238, it was held that the question whether such a deadlock existed as made it just and equitable to wind the company up was a question predominantly of fact in each case.

Lord Donovan said ([1965] 1 MLJ 238 at p 240): G

> In the present case the courts below have held that such a deadlock as would make it just and equitable to wind the company up does not exist. ... Their Lordships cannot override these views, even if they felt disposed to do so, which they do not.

In our case, we do not feel disposed to override the learned judge's H findings. She had considered all the evidence before her and she was entitled to come to the conclusions that she came to based on those evidence.

The final point argued before us was the question of delay. It was contended on behalf of the appellants that there was inordinate delay in the presentation of the petition which should disentitle the petitioner from I getting the equitable relief.

A The learned judge had exercised her discretion and excused the delay. She said ([1994] 3 MLJ 89 at p 102F):

> Given the special circumstances of this case and the position that Peter was placed in, I do not consider that the delay that occurred can prejudice his right to have this petition presented and determined.

B The fact that all parties are related to one another by blood and their natural tendency to try to settle family matters amicably through discussions are some of the circumstances considered by the learned judge.

We do not think we should interfere with the learned judge's exercise of her discretion.

C For the above reasons we dismiss the appeal with costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim

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